No. 11,545

IN THE

United States Court of Appeals
For the Ninth Circuit

Z. E. EAGLESTON, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	

BRIEF IN SUPPORT OF SUPPLEMENT TO STATEMENTS OF POINTS UPON WHICH APPELLANT RELIES ON APPEAL.

GEORGE B. GRIGSBY,
Anchorage, Alaska,
GEORGE T. DAVIS,
HAROLD C. FAULKNER,
A. J. ZIRPOLI,
1101 Balfour Building, San Francisco 4, California,
Attorneys for Appellant.

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PAUL P. O'BRIEN

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BRIEF IN SUPPORT OF SUPPLEMENT TO STATEMENTS OF POINTS UPON WHICH APPELLANT RELIES ON APPEAL.*

STATEMENT OF SUPPLEMENTAL POINTS RELIED UPON.

Appellant relies upon the following supplemental points:

21. That the Court erred in giving to the jury the following instruction:

> "This rule, as to the presumption of innocence, is a humane provision of the law, intended to guard against the conviction of an innocent person, but it is not intended to prevent the conviction of any person who is in fact guilty, or to aid the guilty to escape punishment." (T.R. 7, 8.)

*Appellant abandons Supplemental Points on Appeal 28, 31, 32 and 33.

22. That the Court erred in giving to the jury the following instruction:

> "If the government has proved each and all of these essential elements of the crime charged in the indictment to your satisfaction beyond a reasonable doubt, then you should find the defendant guilty of the crime of assault with a dangerous weapon as charged within the indictment; if not, then you should consider whether the defendant is guilty of assault, not being armed with a dangerous weapon." (T.R. 8.)

23. That the Court erred in giving to the jury the following instruction:

> "The essential elements necessary for conviction of the crime of assault are as follows:
>
> First, that the crime, if any, was committed at Anchorage, Alaska, on July 30, 1946, or at any time within three years prior to October 1, 1946;
>
> Second, that at said time and place the defendant, not being armed with a dangerous weapon, did then and there unlawfully assault or threaten Frank Rowley in a menacing manner, or did then and there unlawfuly strike or wound said Frank Rowley.
>
> If you find that the defendant is not guilty of the crime of assault with a dangerous weapon as charged in the indictment, but you further find that the defendant is guilty of the crime of assault as hereinbefore defined, then you will return a verdict finding the defendant guilty of the crime of assault. But unless you find beyond reasonable doubt that the defendant is guilty of either the crime of assault with a dangerous weapon as

charged in the indictment, or of the crime of assault, then you must acquit the defendant.

The defendant can be justly convicted of assault in the event only that you find beyond reasonable doubt that the defendant unlawfully assaulted Frank Rowley and that at the time of committing such assault the defendant was not armed with a dangerous weapon.

The defendant, if the proof justifies, may be found guilty of either the crime of assault with a dangeous weapon, or of the included crime of assault, but not of both." (T.R. 9, 10.)

24. That the Court erred in giving to the jury the following instruction:

"Whether or not the defendant in this action was, at the time of the alleged assault, armed with a dangerous weapon is a question of fact which you are to determine from the evidence, and in doing so you are to take into consideration all of the circumstances disclosed by the evidence. Unless you are satisfied beyond a reasonable doubt from all of the circumstances in the case that he was armed with a dangerous weapon which, under the circumstances, was capable of producing death or great bodily injury, then you must acquit the defendant of the crime of assault with a dangerous weapon." (T.R. 10.)

25. That the Court erred in giving to the jury the following instruction:

"Part of the evidence in this case is of the kind called 'circumstantial'. Circumstantial evidence is a type of evidence in which proof is given of cer-

tain facts and circumstances from which the jury may infer other and connected facts which usually and reasonably follow from the facts testified to according to reason and the common experience of mankind. There is nothing in the nature of circumstantial evidence which renders it any less reliable than direct evidence. It is sometimes quite as convincing as direct and positive evidence of eye witnesses; in other cases less so. But to be of any weight or force against a person accused of crime, circumstantial evidence must be of such nature as reasonably to lead to the inference of the defendant's guilt and be more consistent with guilt than with innocence." (T.R. 12.)

26. That the Court erred in giving to the jury the following instruction:

"No juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors. But before a verdict of guilty can be rendered, each of you must be able to say, in answer to your individual conscience, that you have arrived at a settled conviction, based upon the law and the evidence of the case and nothing else, that the defendant is guilty." (T.R. 18.)

27. That the Court erred in giving to the jury the following instruction:

"To constitute the crime charged in the indictment, that of 'assault with a dangerous weapon,' the only specific intent necessary is the intent

> embraced in the act of making an assault with a dangerous weapon, which is merely an intentional and unlawful use of a dangerous weapon by means of which an assault is committed with such weapon." (T.R. 13.)

* * * * * * *

29. That the Court erred in giving the three forms of verdict submitted to the jury in the numerical order in which they were given and by numbering them in the manner in which they were numbered without further instructing the jury that they were to make no inference from the fact that the instructions were so numerically given and numbered. (T.R. 20.)

30. That the Court erred in giving to the jury its instructions in that in their entirety and as a whole they failed to adequately protect the rights of appellant and were out of balance.

* * * * * * *

ARGUMENT.

POINT NUMBER 21.

The trial Court erred in giving to the jury the following instruction:

> "This rule, as to the presumption of innocence, is a humane provision of the law, intended to guard against the conviction of an innocent person, but it is not intended to prevent the conviction of any person who is in fact guilty, or to aid the guilty to escape punishment." (T.R. 7, 8.)

The presumption of innocence is one of the fundamentals of the law. It is not to be minimized or denied to anyone accused of crime.

Dodson v. United States, 23 Fed. (2d) 401, 403.

The statement of the trial Court above quoted is not a correct statement of the law and a similar statement was so criticized as being clearly erroneous by the Circuit Court of Appeals for the Fifth Circuit in the case of *Gomila v. United States,* 146 Fed. (2d) 372, wherein the Court said:

> "In charging the jury on the presumption of innocence, the court said: 'The rule of the presumption of innocence imposes upon the government the burden of establishing the guilt of each defendant, as stated, beyond a reasonable doubt, but, Gentlemen, as forceful as that rule is in protecting one charged with crime, it must never be forgotten that it was not intended, nor has it ever been intended, as extending an aid to one, who in fact is guilty, so that he may escape just punishment. The rule is but a humane provision of the law, intended to prevent, so far as human agencies can, the conviction of an innocent defendant, but absolutely nothing more.'
>
> The statement that the presumption of innocence 'was not intended, nor has it ever been intended, as extending an aid to one, who in fact is guilty, so that he may escape just punishment,' is not a correct statement of the law. The presumption of innocence applies alike to the guilty and to the innocent, and the burden rests upon the Government throughout the trial to establish, by proof beyond a reasonable doubt, the guilt of the

accused. Until guilt is established by such proof, the defendant is shielded by the presumption of innocence. The fact of guilt does not enter into the application of the rule, the intent and purpose of which is to protect all persons coming before the courts charged with crime until the presumption of innocence is overthrown by evidence establishing guilt beyond a reasonable doubt; and, where the evidence is purely circumstantial, to the exclusion of every reasonable hypothesis of innocence."

The fact that no objection was taken to the above-quoted charge of the trial Court does not preclude this Court from considering it on appeal, for in *Gomila v. United States,* supra, on page 376 the Court said:

"No objection was made nor was any exception taken to the court's action heretofore discussed, and the rule is invoked that the appellate courts will not consider errors urged for the first time on appeal. That these errors were committed is patent on the face of the record, and, where serious injury may result, it has many times been held that it is the duty of an appellate court to notice and correct said errors even though they were not challenged during the trial. See Lamento v. United States, 8 Cir., 4 F. 2d 901, 904; Benson v. United States, 5 Cir., 112 F. 2d 422, 423; Brasfield v. United States, 272 U.S. 448, 450, 47 S.Ct. 135, 71 L.Ed. 345; United States v. Atkinson, 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555.

The cumulation of these errors cannot be treated as harmless, and nothing remains but to reverse and remand the case for a new trial."

POINTS NUMBERS 22 AND 23.

The trial Court erred in giving to the jury the following instructions:

(a) "If the government has proved each and all of these essential elements of the crime charged in the indictment to your satisfaction beyond a reasonable doubt, then you should find the defendant guilty of the crime of assault with a dangerous weapon as charged within the indictment; if not, then you should consider whether the defendant is guilty of assault, not being armed with a dangerous weapon." (T.R. 8.)

(b) "The essential elements necessary for conviction of the crime of assault are as follows:

First, that the crime, if any, was committed at Anchorage, Alaska, on July 30, 1946, or at any time within three years prior to October 1, 1946;

Second, that at said time and place the defendant, not being armed with a dangerous weapon, did then and there unlawfully assault or threaten Frank Rowley in a menacing manner, or did then and there unlawfully strike or wound said Frank Rowley.

If you find that the defendant is not guilty of the crime of assault with a dangerous weapon as charged in the indictment, but you further find that the defendant is guilty of the crime of assault as hereinbefore defined, then you will return a verdict finding the defendant guilty of the crime of assault. But unless you find beyond reasonable doubt that the defendant is guilty of either the crime of assault with a dangerous weapon as charged in the indictment, or of the crime of assault, then you must acquit the defendant.

The defendant can be justly convicted of assault in the event only that you find beyond reasonable doubt that the defendant unlawfully assaulted Frank Rowley and that at the time of committing such assault the defendant was not armed with a dangerous weapon.

The defendant, if the proof justifies, may be found guilty of either the crime of assault with a dangerous weapon, or of the included crime of assault, but not of both." (T.R. 9, 10.)

A reading of Sections 4778 and 4779 of the Compiled Laws of Alaska (1933) defining assault with a dangerous weapon and assault or assault and battery, clearly demonstrates the confusion which must have resulted in the minds of the jurors by the giving of the aforementioned instructions.

Section 4778 provides:

"Assault with a dangerous weapon.

Whoever, being armed with a dangerous weapon, shall assault another *with such weapon"* shall be punished in the manner provided by law.

Section 4779 provides:

"Assault or assault and battery.

Whoever, not being armed with a dangerous weapon, unlawfully assaults or threatens another in a menacing manner, or unlawfully strikes or wounds another," shall be punished in the manner provided by law.

It becomes obvious from a reading of Section 4779 that the statute covering simple assault is ambiguous

since a situation is created whereby one committing a simple assault, such as a slapping of the face but who in fact happens to be at the time armed with (having in his possession or on his person) a pen knife or a shovel or a rake, has in fact committed no crime. This incongruous situation arising from a reading of Sections 4778 and 4779 of the Compiled Laws of Alaska call for clarification by the Court in such manner as would not confuse the jury and force it to reach a conclusion calling for a verdict of guilty of assault with a dangerous weapon and precluding it from properly considering or finding a simple assault.

POINT NUMBER 24.

The trial Court erred in giving to the jury the following instruction:

> "Whether or not the defendant in this action was, at the time of the alleged assault, armed with a dangerous weapon is a question of fact which you are to determine from the evidence, and in doing so you are to take into consideration all of the circumstances disclosed by the evidence. Unless you are satisfied beyond a reasonable doubt from all of the circumstances in the case that he was armed with a dangerous weapon which, under the circumstances, was capable of producing death or great bodily injury, then you must acquit the defendant of the crime of assault with a dangerous weapon." (T.R. 10.)

This instruction is clearly erroneous because, under the provisions of Section 4778 of the Compiled Laws

of Alaska, above quoted, to be guilty of assault with a dangerous weapon the accused must not only be armed with a dangerous weapon but he must assault another *with such weapon.* The element of assault *with such weapon* is entirely left out of this instruction and it is, therefore, clearly erroneous.

POINT NUMBER 25.

The trial Court erred in giving to the jury the following instruction:

> "Part of the evidence in this case is of the kind called 'circumstantial'. Circumstantial evidence is a type of evidence in which proof is given of certain facts and circumstances from which the jury may infer other and connected facts which usually and reasonably follow from the facts testified to according to reason and the common experience of mankind. There is nothing in the nature of circumstantial evidence which renders it any less reliable than direct evidence. It is sometimes quite as convincing as direct and positive evidence of eye witnesses; in other cases less so. But to be of any weight or force against a person accused of crime, circumstantial evidence must be of such nature as reasonably to lead to the inference of the defendant's guilt and be *more* consistent with guilt than with innocence." (T.R. 12.)

The foregoing is an absolutely incorrect statement of the rule applicable to circumstantial evidence. The correct principle was stated by the Supreme Court of California in *Peo. v. Bender,* 27 Cal. (2d) 164, as follows:

"'That, to justify a conviction, the facts or circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion.'"

This rule so stated by the Supreme Court of California in universally followed in the Federal Courts.

See:

Anderson v. United States, 30 Fed. (2d) 485 (CCA 5);

Crespo v. United States, 151 Fed. (2d) 44 (CCA 1);

United States v. Tatcher, 131 Fed. (2d) 1002 (CCA 3).

To say as the Court said above that circumstantial evidence must be "*more* consistent with guilt than with innocence" is to put proof of guilt or innocence on a comparative basis and does violence to the rule requiring proof beyond a reasonable doubt.

POINT NUMBER 26.

The trial Court erred in giving to the jury the following instruction:

"No juror should hesitate to change the opinion he has entertained, or even expressed, if honestly convinced that such opinion is erroneous, even though in so doing he adopts the views and opinions of other jurors. But before a verdict of guilty can be rendered, each of you must be able to say, in answer to your individual conscience, that you have arrived at a *settled* conviction, based

> upon the law and the evidence of the case and nothing else, that the defendant is guilty." (T.R. 18.)

A *settled* conviction is not conviction or proof beyond a reasonable doubt and this instruction, too, is clearly erroneous.

See:

Arine v. United States, 10 Fed. (2d) 778, 780 (CCA 9).

Who can say what a settled conviction is? The use of this expression tends to minimize the fundamental rule requiring proof beyond a reasonable doubt.

POINT NUMBER 29.

The trial Court erred in giving the three forms of verdict submitted to the jury in the numerical order in which they were given and by numbering them in the manner in which they were numbered without further instructing the jury that they were to make no inference from the fact that the instructions were given in such numerical order and so numbered. This objection standing alone might be deemed harmless, but it becomes prejudicial when considered with the cumulative effect of the other errors of the Court above mentioned.

POINT NUMBER 30.

The trial Court erred in giving to the jury its instructions in that in their entirety and as a whole they fail to adequately protect the rights of the appellant and were out of balance. The cumulation of the errors of the Court in its instructions as hereinabove set forth and as set forth in appellant's opening brief herein cannot be treated as harmless. The fact that no exceptions were taken to the instructions referred to in the foregoing supplemental points on appeal does not preclude this Court from examining such instructions.

See:

Miller v. United States, 120 Fed. (2d) 968 (CCA 10).

CONCLUSION.

The multiple errors assigned and set forth in appellant's opening and closing briefs and in this supplement, clearly present an array of combined injury and prejudice which we respectfully submit call for reversal.

Dated, San Francisco, California,
October 22, 1948.

Respectfully submitted.
George B. Grigsby,
George T. Davis,
Harold C. Faulkner,
A. J. Zirpoli,
Attorneys for Appellant.